Government of the State of Sarawak & Anor v Chong Chieng Jen

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–210–06 OF 2014
DAVID WONG, ABDUL RAHMAN SEBLI AND ZAMANI A RAHIM JJCA
7 APRIL 2016

Civil Procedure — Government proceedings — Suit by government against private person — Whether government right to sue for damages for defamation — Whether right given by s 3 of the Government Proceedings Act 1956 — Whether statutory right could not be taken away by common law principles which held government and governmental bodies could not sue for defamation on ground of public interest — Whether s 3(1) of the Civil Law Act 1956 excluded application of common law of England where other provision had been made by any other written law in force in Malaysia

Civil Procedure — Disposal of case on point of law — Defendant in defamation suit applied to High Court to determine four questions of law to summarily dispose of suit — Defences of justification, fair comment and qualified privilege not raised in questions — Court determined three questions in plaintiff's favour ruling defendant defamed plaintiffs — Whether Court of Appeal hearing appeal only on fourth question and determining same in plaintiff's favour could enter judgment for plaintiff — Whether case could not be remitted back to High Court for trial of defendant's defences as O14A of the Rules of Court 2012 procedure finally determined rights of parties — Whether litigant applying for O 14A procedure to be wary to include in application all questions of law that could determine rights of parties — Rules of Court 2012 O 14A

The respondent was an opposition member of Parliament and state assemblyman in Sarawak whose statement that mismanagement of the state's financial affairs had resulted in the 'disappearance' of RM11 billion in public funds was published by the media. The appellants sued the respondent in the High Court for defamation. The respondent applied under O14A of the Rules of Court 2012 for the court to summarily dispose of the suit by determining four questions of law. Two of those questions were whether the appellants had the right to sue the respondent for damages for defamation and whether the words complained of as appearing in a news portal article had defamed the appellants. In none of the questions posed to the court were the respondent's defences of justification, fair comment and qualified privilege raised. The High Court answered three of the four questions in the appellants' favour (including

that the respondent's statement had defamed the appellants) but dismissed the appellant's claim on the ground they could not, in law, sue for defamation. The court interpreted s 5 of the Defamation Act 1957 to mean that only a human plaintiff, and not the government, could sue for defamation. The court also relied on the '*Derbyshire* principle' laid down by the House of Lords in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; [1993] 1 All ER 1011 which held that: (a) under common law a local authority did not have the right to maintain an action for damages for defamation as it was contrary to public interest for the organs of government, whether central or local, to have that right; and (b) it was of the highest public importance that a governmental body should be open to uninhibited public criticism, and a right to sue for defamation placed an undesirable fetter on freedom of speech. The instant appeal only concerned the question of whether the appellants had the right to sue the respondent for defamation as the respondent did not appeal against the decisions on the other three questions of law. In the instant appeal, the respondent argued that the High Court rightly applied the *Derbyshire* principle as the common law of England applied to the defamation law in Malaysia by reason of s 3 of the Civil Law Act 1956 subject to modification by the Defamation Act 1957. The respondent said if the appellants were allowed to sue for damages for defamation simply because the respondent had criticised them for allegedly mismanaging public funds, that would be contrary to freedom of speech and expression guaranteed under art 10(1)(a) of the Federal Constitution. The appellants, on the other hand, argued that the *Derbyshire* principle did not apply in Malaysia because proceedings by or against the government in Malaysia were not governed by common law principles but by the Government Proceedings Act 1956 and s 3 thereof did not preclude the government from taking action for defamation against any person.

Held, allowing the appeal, setting aside the High Court's decision to dismiss the appellants' claim, entering judgment against the respondent and ordering the deputy registrar of the High Court to assess the damages payable by the respondent:

(1) (**per Abdul Rahman Sebli JCA, majority**) The common law of England as applicable to defamation action by the government or governmental body had no application in Sarawak by reason of s 3(1)(c) of the Civil Law Act 1956 and by reason of s 3 of the Government Proceedings Act 1956 ('the GPA'), which conferred on the state government the same right as a private citizen to sue another private citizen for defamation by way of civil action (see para 79).

(2) (**per Abdul Rahman Sebli JCA, majority**) The statutory right given to the government by s 3 of the GPA to sue for defamation could not be taken away by the application of the common law principle propounded by the House of Lords in the *Derbyshire County Council* case, or, for that matter, any other common law positions in other common law

jurisdictions. Further and in any event, s 3(1) of the Civil Law Act expressly excluded the application of the common law of England where 'other provision had been made or may hereafter be made by any written law in force in Malaysia'. Section 3 of the GPA was one such 'other provision' which did not prohibit or exclude the government from suing for defamation. The common law of England could not override this statutory provision (see paras 77–78).

(3) (**per Abdul Rahman Sebli JCA, majority**) The GPA was promulgated by Parliament to give federal and state governments the right to commence civil proceedings against any person. Section 3 gave the government the same right as a private individual to enforce a claim against another private individual by way of civil action. Thus, if a claim afforded ground for an action in defamation between private individuals, it afforded ground for an action in defamation between the government and private individuals. That was the proper construction to be given to s 3 of the GPA which would not in any way result in an absurdity or a breach of any canon of statutory interpretation. The rule was that if the law did not prohibit, it allowed. If the law allowed it, then it could not be against the public interest to allow the government to sue for defamation. There was nothing in the GPA, in particular s 3 that could be construed as prohibiting the government from proceeding with an action in defamation. Parliament would have said so expressly if it had so intended (see paras 23, 25–26 & 51).

(4) (**per Abdul Rahman Sebli JCA, majority**) To remit the case back to the High Court for trial of the pleaded defence of justification, fair comment and qualified privilege, none of which were posed, let alone determined in the O 14A application, was to defeat the whole purpose behind the O 14A procedure and to open the floodgates for such applications to be made piecemeal and by instalments. By not appealing against the High Court's decisions on the other questions of law, the respondent must be taken to have accepted as the truth the court's finding that the impugned statement attributed to him was defamatory of the appellants. If a litigant omitted to include any question of law that was determinative of the rights of the parties and failed in his application, he could not turn around and say the case should nevertheless proceed to trial on the remaining issues of law that he omitted to include in the O 14A application. Since all four questions in the instant case were answered in the appellants' favour, the claim against the respondent had been established without any further need to hear evidence from the respondent nor for further arguments to be canvassed before the High Court (see paras 82–84, 87 & 90–91).

(5) (**per Abdul Rahman Sebli JCA, majority**) The court disagreed with the respondent's contention that the government had no reputation to

protect in order to give it a cause of action in defamation. Reputation was not the exclusive right of a natural person or a body corporate to protect. While it was true the government could not be injured in its feelings, its reputation could be injured by libel. Anything that was said about the government that had a tendency to lower its reputation in the estimation of right-thinking members of the public, or to expose it to hatred, contempt or ridicule, could give rise to a cause of action in defamation. The government could be criticised and the right to criticise had to be protected as it was a symbol of a functioning democracy. However, what could not be done was to defame the government (see paras 32–35).

(6) (**per Abdul Rahman Sebli JCA, majority**) Being an elected representative of the people did not give the respondent the right to defame the government with impunity. A line had to be drawn between criticism made in good faith and for the greater good of the people and a statement that was unfounded and made recklessly with the sole intention of gaining political mileage by inciting hatred towards the government. A defamatory attack on the government, especially by members of a rival political party, could be taken as an attack on the political party or parties behind the government. This was not to bring politics into the equation but merely to illustrate the point that making unrestrained defamatory statements against the government using freedom of speech and expression as the mantra was dangerous political manoeuvring that could trigger a chain of negative and even violent political reactions that could spiral out of control (see paras 45–46 & 48).

(7) (**per Abdul Rahman Sebli JCA, majority**) The position of the law as explained by the then Supreme Court in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 was clear; that where a provision had been made by statute, the door to the reception of the common law of England after the dates specified in paras (a), (b) and (c) of sub-s 3(1) of the Civil Law Act 1956 was closed. It was wrong to apply the common law of England as expounded in the *Derbyshire County Council* case randomly without regard to the applicable statutory provision, in this case s 3 of the Government Proceedings Act (see paras 62, 64 & 73).

(8) (**per David Wong JCA, dissenting**) Section 3 of the GPA was a general piece of legislation that clothed the government with the legal status to sue or be sued, nothing more or nothing less. It only gave the government the statutory right to mount any legal action in any civil proceeding which was available to and among private citizens of the country. However, that did not answer the question whether the government had a 'cause of action' in an action for defamation. The answer to that question could only be found in the law of defamation independent of s 3 of the GPA (see para 109).

(9) (**per David Wong JCA, dissenting**) Nowhere in any Act of Parliament was there a specific provision allowing the government to maintain an action for defamation to stifle the constitutional right to freedom of speech of citizens of the country. The significance of the absence of such a provision could not be underestimated. There was a presumption the government would not invade constitutional rights and when they did, they could only do so by clear words employed in Acts of Parliament (see para 119).

(10) (**per David Wong JCA, dissenting**) There was no reason why the *Derbyshire* principle should not be adopted in our defamation law as it was consistent not only with art 10 of the Federal Constitution but to all the hallmarks of a modern democracy which, among others, related to the need for accountability, transparency, freedom of expression and a healthy and responsible fourth estate. As pointed out by the Law Lords in the *Derbyshire* case, the government continued to possess the right to take criminal defamation action against whoever uttered malicious defamatory words against it (see para 121).

(11) (**per David Wong JCA, dissenting**) Section 3(1)(c) of the Civil Law Act was no impediment to our courts if and when they deemed it fit to develop our common law. The development of common law in Malaysia rested squarely in our hands and the courts were duty-bound to develop the same to suit the times that we lived in. It might well be that we adopted the English common law but once adopted it became our common law (see para 112).

[Bahasa Malaysia summary

Responden merupakan Ahli Parlimen pembangkang dan Anggota Dewan Undangan Negeri di Sarawak yang kenyataannya bahawa salah urus hal ehwal kewangan negeri telah menyebabkan 'kehilangan' sebanyak RM11 billion dana awam itu diterbitkan oleh media. Perayu menyaman responden di Mahkamah Tinggi kerana fitnah. Responden mengguna pakai A 14A Kaedah-Kaedah Mahkamah 2012 untuk mahkamah secara terus menyelesaikan saman itu dengan menentukan empat persoalan undang-undang. Dua daripada soalan-soalan tersebut adalah sama ada perayu mempunyai hak untuk menyaman responden bagi ganti rugi bagi fitnah dan sama ada perkataan yang diadukan itu sebagaimana yang terdapat dalam artikel portal berita telah memfitnah perayu. Tiada antara soalan yang dikemukakan kepada mahkamah adalah pembelaan responden tentang justifikasi, komen adil dan perlindungan bersyarat yang ditimbulkan. Mahkamah Tinggi menjawab tiga daripada empat soalan yang menyebelahi perayu (termasuk kenyataan responden telah memfitnah perayu) tetapi menolak tuntutan perayu atas alasan mereka tidak boleh, dari segi undang-undang, menyaman kerana fitnah. Mahkamah mentafsirkan s 5 Akta Fitnah 1957 untuk bermakna bahawa hanya plaintif manusia, dan bukan

kerajaan, boleh membawa guaman bagi fitnah. Mahkamah juga bergantung kepada 'prinsip *Derbyshire*' yang ditetapkan oleh House of Lords dalam kes *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; [1993] 1 All ER 1011 yang memutuskan bahawa: (a) di bawah common law pihak berkuasa tempatan tidak mempunyai hak untuk mengambil suatu tindakan bagi ganti rugi untuk fitnah kerana ia adalah bertentangan dengan kepentingan awam untuk organ-organ kerajaan, sama ada pusat atau tempatan, mempunyai hak; dan (b) ia adalah kepentingan awam bahawa badan kerajaan harus terbuka kepada kritikan awam, dan hak untuk menyaman kerana fitnah yang meletakkan suatu belenggu yang tidak diingini ke atas kebebasan bersuara. Rayuan ini hanya berkenaan persoalan sama ada perayu mempunyai hak untuk menyaman responden kerana fitnah kerana responden tidak merayu terhadap keputusan mengenai tiga soalan undang-undang lain. Dalam rayuan ini, responden berhujah bahawa Mahkamah Tinggi dengan betul menggunakan prinsip *Derbyshire* kerana common law England terpakai kepada undang-undang fitnah di Malaysia oleh sebab s 3 Akta Undang-Undang Sivil 1956 tertakluk kepada pengubahsuaian oleh Akta Fitnah 1957. Responden mengatakan jika perayu dibenarkan untuk menyaman bagi ganti rugi kerana fitnah semata-mata kerana responden telah mengkritik mereka atas dakwaan salah urus dana awam, yang mana adalah bertentangan dengan kebebasan bersuara dan berekspresi yang dijamin di bawah perkara 10(1)(a) Perlembagaan Persekutuan. Perayu-perayu, sebaliknya, berhujah bahawa prinsip *Derbyshire* tidak terpakai di Malaysia kerana prosiding oleh atau terhadap kerajaan di Malaysia tidak dikawal oleh prinsip-prinsip common law tetapi oleh Akta Prosiding Kerajaan 1956 dan s 3 Akta tersebut tidak menghalang kerajaan daripada mengambil tindakan untuk fitnah terhadap mana-mana orang.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi untuk menolak tuntutan perayu, memasuki penghakiman terhadap responden dan memerintahkan timbalan pendaftar Mahkamah Tinggi untuk menaksir ganti rugi yang kena dibayar oleh responden:

(1) (**oleh Abdul Rahman Sebli HMR, majoriti**) Common law England bagaimanapun boleh terpakai kepada tindakan fitnah oleh kerajaan atau badan kerajaan tidak terpakai di Sarawak oleh sebab s 3(1)(c) Akta Undang-Undang Sivil 1956 dan oleh sebab s 3 Akta Prosiding Kerajaan ('APK'), yang memberikan kerajaan negeri hak sama sebagai orang perseorangan untuk menyaman orang perseorangan untuk fitnah melalui tindakan sivil (lihat perenggan 79).

(2) (**oleh Abdul Rahman Sebli HMR, majoriti**) Hak statutori yang diberikan kepada kerajaan oleh s 3 APK tidak boleh dirampas melalui permohonan prinsip common law yang dikemukakan oleh House of Lords dalam kes *Derbyshire County Council*, atau, untuk perkara tersebut, dalam mana-mana kedudukan common law lain dalam bidang kuasa

common law lain. Selanjutnya dan dalam apa keadaan, s 3(1) Akta Undang-Undang Sivil mengecualikan permohonan common law England di mana 'other provision had been made or may hereafter be made by any written law in force in Malaysia'. Seksyen 3 APK adalah satu 'other provision' yang tidak menghalang atau mengecualikan kerajaan daripada menyaman untuk fitnah. Common law England tidak mengatasi peruntukan statutori ini (lihat perenggan 77–78).

(3) (**oleh Abdul Rahman Sebli HMR, majoriti**) APK telah digubal oleh Parlimen untuk memberi kerajaan persekutuan dan negeri hak untuk memulakan prosiding sivil terhadap mana-mana orang. Seksyen 3 memberikan kerajaan hak yang sama sebagai individu persendirian untuk menguatkuasakan tuntutan terhadap satu lagi individu persendirian melalui tindakan sivil. Oleh itu, jika tuntutan memberikan alasan bagi tindakan untuk fitnah antara individu-individu persendirian, ia memberikan alasan bagi tindakan untuk fitnah antara kerajaan dan individu-individu persendirian. Ia adalah pembinaan wajar diberikan kepada s 3 APK yang tidak akan dalam apa cara menyebabkan kemustailan atau pelanggaran apa-apa kanun tafsiran statutori. Rukun bahawa jika undang-undang tidak melarang, ia dibenarkan. Jika undang-undang membenarkannya, maka ia tidak boleh bertentangan dengan kepentingan awam untuk membenarkan kerajaan menyaman untuk fitnah. Tiada apa-apa dalam APK, khususnya s 3 yang boleh ditafsir sebagai melarang kerajaan daripada meneruskan tindakan untuk fitnah. Parlimen akan menyatakan dengan jelas jika ia bertujuan sedemikian (lihat perenggan 23, 25–26 & 51).

(4) (**oleh Abdul Rahman Sebli HMR, majoriti**) Bagi merujuk semula kes itu kepada Mahkamah Tinggi untuk perbicaraan pembelaan yang dipli tentang justifikasi, komen adil dan perlindungan bersyarat, yang mana tidak adapun yang dikemukakan, apatah lagi ditentukan dalam permohonan A 14A, adalah untuk mematahkan keseluruhan tujuan di sebalik prosedur A 14A dan untuk membuka ruang untuk permohonan sebegini dibuat sedikit demi sedikit atau secara ansuran. Dengan tidak merayu terhadap keputusan Mahkamah Tinggi tentang persoalan undang-undang lain, responden perlu dianggap telah menerima sebagai kebenaran penemuan mahkamah bahawa kenyataan yang dipersoalkan itu dikaitkan dengannya adalah berunsur fitnah terhadap perayu-perayu. Jika seorang litigan tertinggal untuk memasukkan apa-apa persoalan undang-undang yang boleh menentukan hak pihak-pihak dan telah gagal dalam permohonannya, dia tidak boleh berpaling dan mengatakan kes itu walau bagaimanapun patut diteruskan untuk perbicaraan berhubung isu-isu perundangan yang masih ada di mana dia tertinggal untuk memasukkannya dalam permohonan A 14A. Oleh kerana kesemua persoalan dalam kes ini telah dijawab menyebelahi perayu-perayu, tuntutan terhadap responden telah dibuktikan tanpa

apa-apa keperluan lanjut untuk mendengar keterangan daripada responden ataupun untuk dikemukakan hujah selanjutnya di hadapan Mahkamah Tinggi (lihat perenggan 82–84, 87 & 90–91).

(5) (**oleh Abdul Rahman Sebli HMR, majoriti**) Mahkamah tidak bersetuju dengan hujah responden bahawa kerajaan tiada reputasi untuk dilindungi bagi tujuan memberinya kausa tindakan untuk fitnah. Reputasi bukan hak eksklusif orang sebenar atau badan korporat untuk dilindungi. Pada masa ia adalah benar yang kerajaan tidak menjejaskannya, reputasinya boleh terjejas akibat bertulis ('libel'). Apa-apa yang dikatakan tentang kerajaan yang mempunyai kecenderungan untuk merendahkan reputasinya dalam jangkaan orang awam yang berfikiran waras, atau mendedahkannya kepada kebencian, penghinaan atau ejekan, boleh menimbulkan suatu kausa tindakan untuk fitnah. Kerajaan boleh dikritik dan hak untuk mengkritik perlu dilindungi kerana ia merupakan simbol demokrasi yang berfungsi. Walau bagaimanapun, apa yang tidak boleh dilakukan adalah untuk memfitnah kerajaan (lihat perenggan 32–35).

(6) (**oleh Abdul Rahman Sebli HMR, majoriti**) Sebagai wakil yang dipilih rakyat tidak memberi responden hak untuk memfitnah kerajaan dengan sewenang-wenangnya. Batasan perlu dibuat antara kritikan dibuat dengan niat yang baik dan untuk kebaikan rakyat dan kenyataan yang tidak berasas dan dibuat secara melulu dengan niat semata-mata untuk kepentingan politik dengan mencetuskan kebencian terhadap kerajaan. Serangan fitnah terhadap kerajaan, terutama oleh ahli-ahli parti politik saingan, boleh diambil sebagai satu serangan ke atas parti politik atau parti di belakang kerajaan. Ini adalah untuk tidak mewujudkan persalahfahaman dalam politik tetapi semata-mata untuk menggambarkan hal dengan membuat kenyataan fitnah yang tidak terkawal terhadap kerajaan menggunakan kebebasan bersuara dan berekspresi kerana mantera itu adalah muslihat politik yang berbahaya yang boleh mencetuskan rantaian reaksi politik yang negatif dan juga ganas yang mungkin menjadi tidak terkawal (lihat perenggan 45–46 & 48).

(7) (**oleh Abdul Rahman Sebli HMR, majoriti**) Kedudukan undang-undang sepertimana dijelaskan dalam kes *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 adalah jelas; bahawa di mana ada peruntukan dibuat oleh statut, penerimaan common law England selepas tarikh-tarikh yang ditetapkan dalam perenggan-peranggan (a), (b) dan (c) sub-s 3(1) Akta Undang-Undang Sivil 1965 telah ditutup. Adalah salah untuk mengguna pakai common law England yang dijelaskan dalam kes *Derbyshire County Council* secara rawak tanpa mengambil kira peruntukan undang-undang yang terpakai, dalam kes ini s 3 Akta Prosiding Kerajaan (lihat perenggan 62, 64 & 73).

(8) (**oleh David Wong HMR, menentang**) Seksyen 3 APK adalah sekeping undang-undang umum yang memberikan kerajaan dengan status undang-undang untuk menyaman atau disaman, tiada apa yang lebih atau tiada yang kurang. Ia hanya memberikan kerajaan hak statutori dengan melancarkan apa-apa tindakan undang-undang dalam mana-mana prosiding sivil yang tersedia untuk dan di kalangan orang persendirian di negara ini. Walau bagaimanapun, itu tidak menjawab soalan sama ada kerajaan mempunyai 'kuasa tindakan' dalam sesuatu tindakan kerana fitnah. Jawapan kepada persoalan itu hanya didapati di dalam Taurat bebas fitnah s 3 APK (lihat perenggan 109).

(9) (**oleh David Wong HMR, menentang**) Tiada dalam mana-mana Akta Parlimen terdapat peruntukan khusus yang membolehkan kerajaan untuk mengekalkan suatu tindakan untuk fitnah bagi mengekang hak perlembagaan untuk kebebasan bersuara rakyat di negara ini. Kepentingan ketiadaan peruntukan itu tidak boleh dipandang ringan. Terdapat anggapan kerajaan tidak akan menceroboh hak perlembagaan dan apabila mereka lakukan, mereka hanya boleh berbuat demikian dengan kata-kata yang jelas digunakan dalam Akta Parlimen (lihat perenggan 119).

(10) (**oleh David Wong HMR, menentang**) Tidak ada sebab mengapa prinsip *Derbyshire* tidak perlu diguna pakai dalam undang-undang fitnah kerana ia adalah konsisten bukan sahaja dengan perkara 10 Perlembagaan Persekutuan tetapi kepada semua ciri sebuah demokrasi moden yang antara lain, berkaitan dengan keperluan untuk akauntabiliti, ketelusan, kebebasan bersuara dan estet keempat yang sihat dan bertanggungjawab. Seperti yang dinyatakan oleh Law Lords dalam kes *Derbyshire*, kerajaan terus mempunyai hak untuk mengambil tindakan fitnah jenayah terhadap sesiapa yang mengeluarkan kata-kata fitnah yang berniat jahat terhadapnya (lihat perenggan 121).

(11) (**oleh David Wong HMR, menentang**) Seksyen 3(1)(c) Akta Undang-Undang Sivil tiada halangan kepada mahkamah jika dan apabila ia mendapati adalah sesuai mengembangkan common law. Perkembangan common law di Malaysia terletak sepenuhnya di tangan kita dan mahkamah bertanggungjawab untuk memngembangkan yang sama untuk disesuaikan dengan masa kini. Ia juga mungkin bahawa kita menerima pakai common law England tetapi apabila diterima pakai common law kita bersama (lihat perenggan 112).]

Notes

For a case on suit by government against private person, see 2(2) *Mallal's Digest* (5th Ed, 2015) para 3659.

For cases on disposal of case on point of law in general, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3282–3284.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66, FC (not folld)
Basnol Abol & Ors v The State of Sarawak [2004] 2 CLJ 553, FC (refd)
Bognor Regis UDC v Campion [1972] 2 QB 169, QBC (refd)
Bropho v Western Australia (1990) 170 CLR 1, HC (refd)
Chee Siok Chin v Minister for Home Affairs [2006] 1 SLR 582, HC (refd)
Chew Peng Cheng v Anthony Teo Tiao Gin [2008] 5 MLJ 577, HC (not folld)
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356; [1990] 1 CLJ Rep 57, SC (refd)
City of Chicago v Tribune Co 139 NE 86 (1923) (refd)
Coleman v Power (2004) 220 CLR 1, HC (refd)
Dato' Seri Diraja Hj Adnan Hj Yaakob v Utusan Melayu [2015] MLJU 892; [2015] 7 CLJ 960, HC (refd)
Derbyshire County Council v Times Newspapers Ltd [1993] AC 534; [1993] 1 All ER 1011, HL (not folld)
Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat [2012] 2 MLJ 807; [2011] 1 LNS 1441, HC (refd)
Halton Hills (Town) v Kirouac [2006] OJ No 473, SC (refd)
Jameel and another v Wall Street Journal Europe SPRL [2006] 4 All ER 1279, HL (refd)
Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No 1) [2013] 7 MLJ 52; [2013] 1 CLJ 107, HC (refd)
Kerajaan Negeri Trengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No 2) [2013] 7 MLJ 145; [2013] 1 CLJ 124, HC (refd)
Lee Hsien Loong v Singapore Democratic Party and others and another suit [2006] SGHC 220, HC (refd)
Lee Kuan Yew v Jeyaretnam Joshua Benjamin [1990] 3 MLJ 322; [1990] 1 LNS 78, HC (refd)
Lembaga Kemajuan Tanah Persekutuan & Anor v Dr Tan Kee Kwong [2012] 4 MLJ 622, HC (distd)
Lim Guan Eng v Utusan Melayu (M) Sdn Bhd [2012] 2 MLJ 394; [2012] 2 CLJ 619, HC (refd)
Reynolds v Times Newspapers Ltd & Ors [2001] 2 AC 127, HL (refd)
Tony Pua Kiam Wee v Syarikat Bekalan Air Selangor Sdn Bhd [2013] 1 LNS 1433, CA (distd)

Legislation referred to

Civil Law Act 1956 ss 3, 3(1), 3(1)(a), (b), (c)
Companies Act 1965
Contracts Act 1950 s 24
Crown Proceedings Act 1947 [UK]
Defamation Act 1957 s 5
Federal Constitution art 10(1)(a), (2)(a)
Government Proceedings Act 1956 ss 2(2), 3, 7(1), (3), 22(1)

Interpretation Ordinance (Cap 61) s 3(4)
Land Development Act 1956 s 15(1)
Penal Code s 499
Printing Presses and Publications Act 1984 s 7(1)
Racial Discrimination Act 1975 [AUS] s 18C
Rules of Court 2012 O 14A, O 18 rr 19(1)(b), (c), (d), O 92 r 4
Sedition Act 1948
Specific Relief Act 1950 Chapter VIII

Appeal from: Suit No KCH-21–12/4 of 2013 (High Court, Kuching)

JC Fong (Talat Mahmood bin Abdul Rashid, Mohd Adzrul bin Adzlan, and Azreen Fasya bt Mohamad Abu Bakar with him) (Senior Federal Counsel, State Attorney General's Chambers) for the complainant.
Chong Siew Chiang (Carol Lua with him) (Chong Brothers Advocates) for the respondent.

Abdul Rahman Sebli JCA (delivering majority judgment):

[1] We heard arguments on 9 December 2015 and reserved judgment to a date to be fixed. Having deliberated on the matter, we have come to a split decision. Our learned brother Justice David Wong Dak Wah is in favour of dismissing the appeal whereas my learned brother Justice Zamani A Rahim and I are in favour of allowing the appeal. This then is our majority decision.

[2] This appeal is against the decision of the High Court at Kuching that decided that although the state government or a statutory body can sue or be sued, that right does not extend to the right to sue for defamation. In the result the state government and the state financial authority's action for defamation against the respondent was dismissed with costs.

[3] The action did not proceed to full trial as it was decided purely on points of law pursuant to an application made by the respondent under O 14A of the Rules of Court 2012 ('the Rules'). A determination under this rule binds the parties and no evidence is required to prove the pleaded facts in issue.

[4] There were four questions of law posed for the High Court's determination and they were as follows:

(1) whether the first appellant (first plaintiff in the court below), being the State Government of Sarawak, and/or the second appellant (second plaintiff in the court below), being a government department and an

organ of the government have the right to sue and to maintain an action for damages for defamation against the respondent (defendant in the court below);

(2) whether the actual or precise words complained of and alleged to be defamatory of the appellants and/or the actual original words alleged to be defamatory of the appellants in the alleged DAP leaflet (which were written in both Chinese and English languages) must be specifically pleaded or set out in the amended statement of claim;

(3) whether the words complained of and set out in para 6 of the amended statement of claim derived from the alleged *Malaysiakini* dated 18 February 2013, are capable of bearing any defamatory meaning, and/or are capable of being understood to refer to the first and second appellants as a matter of law; and

(4) in an action for libel, whether it is permissible in law to group together several articles from different publications in the amended statement of claim, without spelling out separately and distinctly what is the precise and pleaded defamatory meaning(s) or imputation(s) that each article is capable of conveying against the person defamed.

[5] We are only concerned with question (1) as the other three questions were answered in favour of the appellants and no appeal or cross-appeal was filed by the respondent against the decision. The respondent is therefore deemed to accept the High Court's determination on those issues of law.

[6] The defamatory statement attributed to the respondent, who is a Member of Parliament for Bandar Kuching and the State Assemblyman for Kota Sentosa pertains to the alleged mismanagement of the state's financial affairs, where he alleged that RM11 billion of public fund had disappeared into a 'black hole', whatever he meant by that hole but certainly uncomplimentary of the state government.

[7] The statement was published in two publications, namely the *Sin Chew Daily News* on 3 January 2013 and in the DAP's leaflet both in Chinese and English and also in an online news portal *Malaysiakini* on 18 February 2013. The DAP leaflet contains a drawing of the figure 'RM11,000,000,000' being sucked into a whirlpool with a black hole at the center.

[8] Among the statements attributed to the respondent as translated into English in Appendix D was the following:

Chong said whenever people talked about the lack of facilities, the government always give a lame excuse of not having enough fund but right unknown to us there is this RM11 billion disappearing into the blackhole. Chong said this proved a point that the state does not have money its because state money going somewhere else and Chong warned the state government that they may be able to get away from the Opposition questioning but they cannot get away from the people as a whole.

[9] In answering question (1) in the negative, the learned judge relied on the principle laid down by the House of Lords in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; [1993] 1 All ER 1011, which Her Ladyship aptly described as the '*Derbyshire* principle' where it was held, affirming the decision of the Court of Appeal, as follows:

(a) under common law a local authority does not have the right to maintain an action for damages for defamation as it would be contrary to the public interest for the organs of government, whether central or local, to have that right; and

(b) it was of the highest public importance that a governmental body should be open to uninhibited public criticism, and a right to sue for defamation would place an undesirable fetter on freedom of speech.

[10] The learned judge noted that the *Derbyshire* principle had been applied in Malaysia in two High Court cases, namely *Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No 1)* [2013] 7 MLJ 52; [2013] 1 CLJ 107 and *Kerajaan Negeri Trengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No 2)* [2013] 7 MLJ 145; [2013] 1 CLJ 124. These two cases went up on appeal to this court where the outcome was that the decision in the first case was affirmed whereas the decision in the second was reversed.

[11] Unfortunately we do not have the benefit of the grounds of judgment of either case to enable us to know the actual reasons for the decisions. It is interesting to note though that the two cases involved the same parties and were decided by the same High Court judge.

[12] It is obvious that the decision of the House of Lords in *Derbyshire County Council* was based on the common law of England, which emphasised on public interest and the freedom of expression to criticise the government and its organs, in that case the local government.

[13] The precise scope of the rule is however unclear: see *Butterworths Common Law Series by Duncan and Neill on Defamation* (4th Ed) at para 10.07. What is clear is that the decision was made against the backdrop of a developed democracy whose social fabric and geopolitics are very different from ours.

[14] *Derbyshire County Council* was followed in two other House of Lords decisions, namely *Reynolds v Times Newspapers Ltd & Ors* [2001] 2 AC 127 and *Jameel and another v Wall Street Journal Europe SPRL* [2006] 4 All ER 1279. Before the decision in that case, the common law of England allowed a local government to sue for defamation as demonstrated by the judgment of Browne J in *Bognor Regis UDC v Campion* [1972] 2 QB 169 where he ruled:

> Just as a trading company has a trading reputation which it is entitled to protect by bringing an action for defamation, so in my view the plaintiffs as a local government has a 'governing reputation' which they are equally entitled to protect in the same way — of course, bearing in mind the vital distinction between defamation of the corporation and defamation of its individual officers or members.

[15] The *Derbyshire County Council* case, decided in 1993 had thus changed the common law of England in this area of the law. Mr Chong Siew Chiang for the respondent submitted that the *Derbyshire* principle can be applied to the present case as the common law of England applies to defamation law in Malaysia by reason of s 3 of the Civil Law Act 1956 ('the Civil Law Act') but subject to modification by the Defamation Act 1957 (Revised 1983) ('the Defamation Act').

[16] For this proposition he cited the following authorities: *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66, a Federal Court decision and *Chew Peng Cheng v Anthony Teo Tiao Gin* [2008] 5 MLJ 577, a decision of the Sibu High Court.

[17] It was strenuously argued that to allow the State Government of Sarawak and the state financial authority to maintain an action for damages for defamation against the respondent simply for criticising them for mismanaging public fund, which runs into billions of ringgit will go against art 10(1)(a) of the Federal Constitution which guarantees freedom of speech and expression.

[18] It was further submitted that to allow the appellants the right to sue the respondent for defamation in all the circumstances of the case is altogether unprecedented and there is no principle of law on which it can be founded.

[19] Datuk JC Fong for the appellants on the other hand argued that the *Derbyshire* principle, based as it is on the common law of England has no application in Malaysia, for the following two reasons:

(a) proceedings by or against the government are not bound by common law rules but are regulated by statute, ie s 3 of the Government Proceedings Act 1956 ('the Government Proceedings Act'); and

(b) s 3 of the Government Proceedings Act does not exclude proceedings in libel or defamation by or against the government.

[20] Section 3 of the Government Proceedings Act reads as follows:

> 3 Subject to this Act and of any written law where the Government has a claim against any person which would, if such claim had arisen between subject and subject, afford ground for civil proceedings, the claim may be enforced by proceedings taken by or on behalf of the Government for that purpose in accordance with this Act.

[21] We note that the learned judge in her grounds of judgment did not direct her mind to this provision, which is crucial for the determination of question (1). Her focus was on s 5 of the Defamation Act, which provides as follows:

> 5 In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication, it shall not be necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

[22] Her Ladyship interpreted the word 'plaintiff' in the above provision as to mean, by virtue of s 3(4) of the Interpretation Ordinance of Sarawak, the male and female gender. It follows, according to the learned judge, that only a human being can sue for defamation and not a government.

[23] There can be no argument that the Government Proceedings Act is a special statute specially promulgated by Parliament to give the federal and state governments the right to commence civil proceedings against any person. Section 3 gives the government the same right as a private individual to enforce a claim against another private individual by way of civil action. It is a statutory right and not a common law right.

[24] The term 'civil proceedings' used in s 3 is defined by s 2(2) to mean 'any proceeding whatsoever of a civil nature before a court' and the operative words in s 3 are 'which would, if such claim had arisen between subject and subject, afford ground for civil proceedings', meaning to say if a claim affords ground for civil proceedings between private individuals, it will afford ground for civil proceedings between the government and private individuals.

[25] Thus, if a claim affords ground for an action in defamation (which is a form of civil action) between private individuals, it will afford ground for an action in defamation between the government and private individuals. That in

our view is the proper construction to be given to s 3 of the Government Proceedings Act and will not in any way result in an absurdity or be in breach of any canon of statutory interpretation.

[26] The rule is that if the law does not prohibit, it allows. There is nothing in the Government Proceedings Act, in particular s 3 that can be construed as to prohibit the government from proceeding with an action in defamation. Parliament would have said so expressly if it had so intended.

[27] What is expressly prohibited by s 3 read with s 2(2) of the Government Proceedings Act is proceedings under Chapter VIII of the Specific Relief Act 1950, or such proceedings as would in England be brought on the Crown side of the Queen's Bench Division. Defamation does not fall under either of these two categories of proceedings.

[28] If a claim for defamation were to be singled out as a cause of action that is prohibited by s 3, then what is there to stop the argument that some other causes of civil action by the government are also prohibited?

[29] For example, there is nothing in the Government Proceedings Act that expressly gives the government the right to sue for breach of contract, in as much as it does not expressly give the government the right to sue for defamation. What it does provide is the reverse, ie that an action shall lie against the government for breach of contract, negligence or trespass in the execution of works of construction or maintenance undertaken by the government or any public officer in the exercise of the public duties of the government: see s 7(1) and (3). Does this mean that the government cannot sue for breach of contract, but only the subject can sue the government? Certainly not.

[30] Nor does the legislative scheme of the provision warrant such interpretation. On the contrary the provision is clearly inclusive as it speaks of 'any proceeding whatsoever of a civil nature'. We do not think there is any alternative to the argument that a claim for defamation is a proceeding 'whatsoever of a civil nature' within the meaning of s 2(2) of the Government Proceedings Act.

[31] The word 'whatsoever' is a word of wide import and is a derivative of the word 'whatever', which the *Concise Oxford English Dictionary* (11th Ed-Revised) defines as follows:

> used to emphasise a lack of restriction in referring to any thing, no matter what.

[32] In the context of s 3 of the Government Proceedings Act, it means there is no restriction on the part of the government to sue for defamation. Having

regard to the clear and unambiguous language of s 3, the real issue in our view is not whether the government has a right to sue for defamation but whether the government has a reputation to protect in order to give it a cause of action in defamation.

[33] Mr Chong Siew Chiang submitted that it has none. We respectfully disagree as reputation is not the exclusive right of a natural person or a body corporate to protect. While it is true that the government cannot be injured in its feelings, its reputation can be injured by a libel.

[34] Thus, anything that is said about the government that has a tendency to lower its reputation in the estimation of right thinking members of the public, or to expose it to hatred, contempt or ridicule, will give rise to a cause of action in defamation. It is the same test that is applicable in a claim for defamation between private individuals.

[35] We are not suggesting of course that the government cannot be criticised. It can and that right to criticise must be protected as it is a symbol of a functioning democracy. What cannot be done however is to defame the government. So when Mr Chong Siew Chiang referred to the impugned statement as a 'criticism', we understand him to mean it in the defamatory sense.

[36] In any event, the issue of whether the impugned statement is defamatory or otherwise must be put to rest as the learned judge had determined the statement to be defamatory of the appellants and the respondent accepted it by not filing any appeal against the determination.

[37] The learned judge relied on the Court of Appeal stage of the *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; [1993] 1 All ER 1011 to support her reasoning that the government's reputation is adequately protected by an action for malicious falsehood or by a prosecution for criminal libel.

[38] With due respect to the learned judge, that does not answer the question whether the statutory right given to the government by s 3 of the Government Proceedings Act to sue for defamation is thereby abrogated by such protection. In any case, if the government can institute criminal proceedings for libel to protect its reputation, we see no reason why it cannot institute civil proceedings for the same purpose.

[39] As a matter of fact, criminal prosecution for libel is a far more serious impediment to free speech and expression than a civil action is. A person can be incarcerated for committing a criminal offence whereas the worst that a person

can expect if found liable for a civil wrong is to pay damages and costs. It will hurt his pocket but he will not lose his freedom, unless of course he defies the court order and be cited for contempt.

[40] Whether a statement is in law and in fact defamatory of the government and whether the defendant in such action can avail himself of the defence of fair comment, justification or qualified privilege under the Defamation Act are matters to be decided at the trial, or alternatively by way of determination under O 14A of the Rules as was done in this case. They are unrelated to the issue of whether the government has a right to sue for defamation.

[41] The Defamation Act, which Mr Chong Siew Chiang said is to be read together with s 3 of the Civil Law Act but subject to modification, does not deal with the right of the government to commence civil proceedings against any person. The statute that deals with that right is the Government Proceedings Act.

[42] It is cliche to say that the right to freedom of speech and expression guaranteed by art 10(1)(a) of the Federal Constitution is not an absolute and unfettered right. It has to be so for if it were otherwise, all laws that restrict the freedom of speech and expression will be liable to be struck down as being unconstitutional and no such law can be enacted by Parliament.

[43] We are not aware of any such law that has been struck down by the court on such ground. On the contrary all such laws are perfectly valid by reason of art 10(2)(a) of the Federal Constitution. This constitutional restriction dispels any notion that the freedom of speech and expression guaranteed by art 10(1)(a) is absolute and unfettered.

[44] To allow absolute and unfettered freedom to defame the government (as opposed to fair comment or criticism) all in the name of freedom of speech and expression is to allow lawlessness to prevail. We must not be blind to the reality that behind every government is a political party or a coalition of political parties, with power politics being the *raison d'etre* for their existence.

[45] A defamatory attack on the government, especially by members of a rival political party will be taken as an attack on the political party or parties behind the government. This applies across the board to any political entity that forms the government of the day and to those who defame it.

[46] This is not to bring politics into the equation but merely to illustrate the point that making unrestrained defamatory statements against the government using freedom of speech and expression as the mantra is a dangerous political maneuvering that can trigger a chain of negative and even violent political

reactions that can spiral out of control. We must never underestimate the destructive power of words.

[47] When that happens it will not surprise anyone if those responsible for starting the fire will be the first to disclaim responsibility. If power corrupts and absolute power corrupts absolutely, the thirst for power corrupts and corrupts absolutely in its own way.

[48] Being an elected representative of the people does not give the respondent the right to defame the government with impunity. A line has to be drawn between criticism that is made in good faith and for the greater good of the people and a statement that is unfounded and made recklessly with the sole intention of gaining political mileage by inciting hatred towards the government. Outside of Parliament or state assembly in session, no member of Parliament or state assemblyman is immune from defamation action.

[49] The government has no better right to protect its reputation than the respondent is to protect his reputation as a member of Parliament, state assemblyman and as a private citizen from defamatory attack by the government, who too can be sued for defamation: see *Carter-Ruck on Libel and Privacy* (6th Ed) at para 8.13.

[50] We must point out however that the learned authors of this publication also subscribe to the common law principle that the government has no locus standi or right to maintain an action for defamation.

[51] To the question 'Is it in the public interest to allow the government to sue for defamation?', our answer is simply this. If the law allows it, then it cannot be against the public interest. Parliament, as is often said, does not legislate in vain. It must have had the public interest in mind when enacting s 3 of the Government Proceedings Act 1956 by not excluding defamation from its ambit.

[52] The cases of *Abdul Rahman Talib* and *Chew Peng Cheng* cited by the respondent are not relevant as both are decisions on the defence of fair comment and justification under the Defamation Ordinance 1957 and the Defamation Act respectively. They are not authorities for the proposition that the government has no right of action in defamation.

[53] It was also Mr Chong Siew Chiang's submission, which found favour with the learned judge, that since the tort of defamation is an action *in personam* and against the private reputation of a natural or juristic person, the proper person to sue as plaintiff is the natural person so defamed.

[54] According to Mr Chong Siew Chiang, if that person is the Chief Minister of Sarawak, then it is the Chief Minister of Sarawak who must sue in his own name and in his personal capacity and not in the name of the state government. The judgments in *Lim Guan Eng v Utusan Melayu (M) Sdn Bhd* [2012] 2 MLJ 394; [2012] 2 CLJ 619; *Lee Kuan Yew v Jeyaretnam Joshua Benjamin* [1990] 3 MLJ 322; [1990] 1 LNS 78; *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807; [2011] 1 LNS 1441 were cited in support.

[55] With due respect, we do not find any merit in the argument. Under s 22(1) of the Government Proceedings Act 1956, civil proceedings by the government of a state must be instituted by the state government. Thus, if the object of the defamatory statement is the state government, any action that is taken against the defamer must be in the name of the state government and not in the name of any individual member of the administration.

[56] An example would be where the state government is wrongly accused of misusing state fund. Here, it is the integrity of the state government that is being called into question and not the integrity of any individual member of the administration. It is therefore the state government and not an individual member of the administration that may institute the defamation action.

[57] The statutory right of the state government to sue for defamation is independent of the right of any member of the administration, including the Chief Minister to sue in his own name and in his personal capacity.

[58] If any of them were to sue in that capacity, it will be an action between private citizens and not between government and citizen. Such action does not involve the affairs of the state. It is purely a private and personal matter. An example would be where a member of the state administration is wrongly accused of being a thief, and it does not matter if he is accused of stealing government money or money belonging to a private citizen. It is still a private and personal matter between the accuser and the accused.

[59] The three cases cited by Mr Chong Siew Chiang are of no assistance to the respondent as again they are not authorities on the issue of whether the government has a right of action in defamation. The members of the administration in those cases chose to sue in their own names and in their personal capacities and it was their right to do so as the defamatory statements were private and personal in nature.

[60] This brings us to the question of the reception of the common law of England in Sarawak, which is regulated by s 3(1)(c) of the Civil Law Act which reads:

A 3 (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —

(a) ...

(b) ...

B (c) in Sarawak, apply the common law of England and the rules of equity, together with the statutes of general application, as administered or in force in England on 12 December 1949, subject however to sub-section (3)(ii) —

C Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

D **[61]** Since the *Derbyshire* principle which the learned judge used as the basis for her decision is based on the common law of England, it is important to determine the extent to which the common law of England can be applied in Malaysia.

E **[62]** The authority on point is the then Supreme Court case of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356; [1990] 1 CLJ (Rep) 57 where Hashim Yeop Sani CJ (Malaya) delivering the judgment of the court explained the position as follows at p 66:

F Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit *and save where no provision has been made by statute law*. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. *We cannot just accept the development of the common law in England*. See also one of the majority judgments in *Government of Malaysia v Lim Kit Siang* [1998] 2 MLJ 12 at
G p 40. (Emphasis added.)

[63] His Lordship then went on to deal with the applicability of the common law of England to illegal contracts under s 24 of the Contracts Act 1950. This is how the learned CJ (Malaya) dealt with the issue:

H The provision of s 24 of our Contracts Act is a statutory direction. It may well have originated from some old common law principle but that principle has now been converted into a statutory provision.

I We are therefore unable to accept the submission of Mr Puthucheary that we follow what he termed as the 'trend' shown by the courts in common law countries to be slow in striking down illegal contracts because that contention is untenable in the face of statute law of this country.

[64] The position of the law as explained in *Chung Khiaw Bank* is clear, that

where a provision has been made by statute, the door to the reception of the common law of England after the dates specified in paras (a), (b) and (c) of sub-s 3(1) of the Civil Law Act 1956 is closed. A

[65] After these dates, the development of the common law in Malaysia is 'entirely in the hands of the courts of this country' and 'We cannot just accept the development of the common law in England'. For the State of Sarawak, the cut off date is 12 December 1949. B

[66] Mr Chong Siew Chiang relied heavily on the proviso to s 3(1) of the Civil Law Act 1956 to argue that the common law of England applies to defamation law in Malaysia. With due respect, the argument is flawed as it looks at the proviso in isolation without reading it together with the main body of sub-s (1), which sets out cut off dates for the application of 'the said common law' of England in Peninsular Malaysia, Sabah and Sarawak. C D

[67] There was no argument as to what the common law of Sarawak is in relation to an action for defamation by the state government or by statutory authorities post 12 December 1949. We shall therefore leave the question open for determination at some other time on some other occasion. E

[68] But whatever may be the common law of Sarawak in this area of the law, we cannot just accept the common law of England as it stood in 1993. We will be doing just that if we just accept the *Derbyshire* principle as the applicable law and close both eyes to s 3 of the Government Proceedings Act. F

[69] It may be worth noting that the Government Proceedings Act follows the UK Crown Proceedings Act 1947 ('the Crown Proceedings Act') which altered the general rule at common law that no proceeding, civil or criminal, was maintainable against the monarch in person, for it was said that the courts being the King's own, could have no jurisdiction over him. It was based on the maxim 'the King can do no wrong'. G

[70] Under the Crown Proceedings Act, enforcement of orders by or against the crown in civil proceedings are now governed by the same rules and in the same circumstances as between subjects: see *Halsbury's Laws of England* Vol 12(1) (5th Ed) para 1239. H

[71] There is however, and this is a very important distinction, no provision in the Crown Proceedings Act which is in *pari materia* with s 3 of the Government Proceedings Act. In fact if we look at the shoulder note and side note to the corresponding provisions in the two Acts of Parliament, the difference in emphasis is obvious. I

[72] Whereas the shoulder note to Part II of our Government Proceedings Act under the heading 'SUBSTANTIVE LAW' reads: 'Right of the Government to sue', the side note to Part I of the UK Crown Proceedings Act under the same heading reads: 'Right to sue the Crown'.

[73] So the emphasis is at opposite ends of the pole. In view of such fundamental difference in emphasis, which we think cannot be trivialised or ignored, it will be wrong to apply the common law of England as expounded in the *Derbyshire County Council* case randomly without regard to the applicable statutory provision, in this case s 3 of the Government Proceedings Act. The *Derbyshire* principle must be considered from this perspective.

[74] Within our shores there are at least two decisions of this court that expressed the view that the common law of England does not apply to bar defamation suits by public authorities. The first is *Lembaga Kemajuan Tanah Persekutuan & Anor v Dr Tan Kee Kwong* [2012] 4 MLJ 622 which decided (by majority) as follows:

> It was submitted on behalf of the respondent that the principle in *Derbyshire County Council* ought to be applied as it has been applied in several commonwealth jurisdictions. With respect, we do not find any justification for applying the *Derbyshire County Council* principle here. In particular, s 15(1) of the Act gives the appellant the right to sue and be sued. It would be preposterous for the court to take away a statutory right by the application of English common law principles. Even s 3(1)(a) of the Civil Law Act which allows the application of English common law does not contemplate its application beyond what is administered on 7th day of April 1956.

[75] The second case is *Tony Pua Kiam Wee v Syarikat Bekalan Air Selangor Sdn Bhd* [2013] 1 LNS 1433 where the following observations were made:

> The local authorities recognise the right of private companies involved in the provision of public services to sue in defamation. The reasons advanced by English authorities such as *Derbyshire County Council v Times Newspapers Ltd & Ors* [1993] AC 534 in denying this right to a company performing a similar role to the respondent in the United Kingdom to institute proceedings in defamation, has to date not been accepted by our courts as the law of this country. As we do not consider the impugned words to be defamatory, we do not propose in this judgment to interfere with the ruling of the learned trial judge that the respondent enjoyed the necessary locus to institute a claim for defamation against the appellant.

[76] It is rather unfortunate that these two cases were not brought to the attention of the learned judge for her consideration. If they had, her answer to question (1) might well have been different. The facts may be distinguishable from the facts of the present case but the important point to note is that in both cases this court refused to apply the *Derbyshire* principle.

[77] Having given anxious consideration to the competing arguments, we are inclined to agree with Datuk JC Fong that the statutory right given to the government by s 3 of the Government Proceedings Act to sue for defamation cannot be taken away by the application of the common law principle propounded by the House of Lords in the *Derbyshire County Council* case or, for that matter, any other common law positions in other common law jurisdictions.

[78] Further and in any event, s 3(1) of the Civil Law Act expressly excludes the application of the common law of England where 'other provision has been made or may hereafter be made by any written law in force in Malaysia'. Section 3 of the Government Proceedings Act is one such 'other provision' which, as we have said, does not prohibit or exclude the government from suing for defamation. The common law of England cannot override this statutory provision.

[79] Accordingly, we hold that the common law of England as applicable to defamation action by the government or governmental body has no application in Sarawak by reason of s 3(1)(c) of the Civil Law Act and by reason of s 3 of the Government Proceedings Act, which confers on the state government the same right as a private citizen to sue another private citizen for defamation by way of civil action.

[80] For all the reasons aforesaid, we allow the appeal with no order as to costs. The decision of the High Court dismissing the appellants' claim is set aside. The deposit, if paid, is to be refunded to the appellants.

[81] There remains the question of the consequential effect of our decision, given that question (3) for the High Court's determination was answered in favour of the appellants and no appeal or cross-appeal was filed by the respondent against the determination. For ease of reference, we reproduce below question (3) in its original form:

> (3) Whether the words complained of and set out in paragraph 6 of the Amended statement of claim derived from the alleged Malaysiakini dated 18 February 2013, are capable of bearing any defamatory meaning, and/or are capable of being understood to refer to the 1st and 2nd plaintiffs as a matter of law.

[82] By not appealing or cross-appealing against the High Court decision on this question of law, the respondent must be taken to accept as the truth the court's finding that the impugned statement attributed to him was defamatory of the appellants.

[83] Now that we have answered question (1) in favour of the appellants, the

question is whether we should enter judgment against the respondent, or to remit the case back to the High Court for the learned judge to deal with the remaining issues, in particular the pleaded defence of justification, fair comment and qualified privilege, none of which were posed, let alone determined in the O 14A application.

[84] Having given the matter serious consideration, we do not think it will be proper for us to remit the case back to the High Court for trial as that will defeat the whole purpose behind the O 14A procedure, which is to save the expense and delay which would otherwise arise if the action were to proceed to full trial: see *Malaysian Court Practice 2007* (Desk Ed) at p 140.

[85] When the learned judge decided to hear the case in accordance with the procedure prescribed by O 14A, she must have been satisfied that the four questions posed by the respondent were suitable for determination without the full trial of the action and that such determination would finally determine the entire cause of the matter. That would also have been what the respondent had in mind when making the application under O 14A.

[86] Thus, when the learned judge dismissed the appellants' claim in its entirety after determining question (1) in favour of the respondent and questions (2), (3) and (4) in favour of the appellants, Her Ladyship had in fact finally determined the entire cause of the matter pursuant to O 14A r (2), exactly as intended by the respondent. Had question (1) been answered in favour of the appellants along with question (2), (3) and (4), final judgment would have been entered against the respondent.

[87] To now allow the case to proceed to trial despite having been finally disposed of under O 14A is to open the floodgates for such applications to be made piecemeal and by installment. Technically, it is still open to the respondent to make another such application if we were to remit the case back to the High Court for trial.

[88] Considering that a decision under O 14A is a final decision in that it finally determines the rights of the parties and therefore appealable to this court and potentially to the Federal Court with leave, any further appeal upon further determination under O 14A will further delay the final disposal of the case. We do not think we should set a dangerous precedent by allowing trial after a determination under O 14A.

[89] A litigant who moves the court under O 14A must not pose the questions out of curiosity just to see what the court's views will be on the points of law that he is posing for determination. That will be an abuse of process. Once the questions are cast in stone and determined by the court, he is bound

by the decision in the same way that the opposing party is bound by the decision, either for the entire claim to be dismissed or for final judgment to be entered. The matter must end there.

[90] If a litigant omits to include any question of law that is determinative of the rights of the parties and fails in his application, he cannot turn around and say that the case must nevertheless proceed to trial as the court has yet to decide on the remaining issues of law that he omitted to include in the O 14A application. He cannot have the best of both worlds and to approbate and reprobate.

[91] In our view, since all four questions have now been answered in favour of the appellants, the claim against the respondent has been established without any further need to hear evidence from the respondent nor for further arguments to be canvassed before the learned High Court judge.

[92] In the circumstances we enter judgment against the respondent in terms of prayers (1) and (2) of the amended statement of claim. Damages is to be assessed by the deputy registrar of the High Court.

David Wong JCA (delivering dissenting judgment):

INTRODUCTION:

[93] I have read the draft grounds of my learned brother, Justice Abdul Rahman bin Sebli with whom my learned brother Justice Zamani bin A Rahim agrees. However, with regret and greatest respect, I am unable to concur with them on the outcome of this appeal. Hence the grounds herein are my views and reasons as to what I think should be the outcome of this appeal.

[94] This is an appeal by the appellants/plaintiffs against the ruling of the Kuching High Court where the learned judge dismissed the appellants' claim for defamation against the respondent premised on the ground that the appellants do not in law have a cause of action in defamation.

[95] We heard the appeal on 9 December 2015 and reserved judgment to consider the submissions of respective counsels. Having done that, I now give my decision and grounds.

BACKGROUND FACTS

[96] The respondent is a member of Parliament and the Sarawak State Assembly. He is also the then Vice-Chairman of the Democratic Action Party

('DAP'). The genesis of this suit is the alleged utterances of libellous statements against the appellants relating to the allocation and spending of over RM11 billion of public money. These utterances were published in the *Sin Chew Daily News* on 3 January 2013, the DAP's leaflet in both Chinese and English and in a portal, *Malaysiakini* on 18 February 2013.

[97] Prior to the start of the trial of the suit, the respondent took out an application under O 14A of the Rules of Court 2012 for four questions to be adjudicated upon and they were as follows:

(1) whether the abovenamed first plaintiff (first appellant), being the State Government of Sarawak, and/or the second plaintiff (second appellant), being a government department and an organ of the government have the right to sue and to maintain an action for damages for defamation against the defendant?

(2) whether the actual or precise words complained of and alleged to be defamatory of the plaintiffs and/or the actual original words alleged to be defamatory of the plaintiffs in the alleged DAP leaflet (which were written in both Chinese and English languages) and/or in *Sin Chew Daily News* dated 3 January 2013 (which were written in Chinese language) must be specially pleaded or set out in the amended statement of claim?

(3) whether the words complained of and set out in para 6 of the amended statement of claim derived from the alleged article in *Malaysiakini* dated 18 February 2013, are capable of bearing any defamatory meaning, and/or capable of being understood to refer to the first and second plaintiffs as a matter of law? and

(4) in an action for libel, whether it is permissible in law to group together several articles from different publications in the amended statement of claim, without spelling out separately and distinctly what is the precise and pleaded defamatory meaning(s) or imputation(s) that each article is capable of conveying against the person defamed?

[98] Out of the four questions, the learned High Court judge answered in favour of the appellants except for question (1). No appeal was made by the respondents for questions answered in favour of the appellants. That being the case, the only issue which needs our deliberation is the capacity of the appellants to launch a defamatory suit against the respondent.

HIGH COURT DECISION

[99] It would not be wrong for me to say that the learned judge in coming to her decision had adopted the approach of the House of Lord's decision in

Derbyshire County Council v Tunes Newspapers Ltd (1993) 1 All ER 1011 ('*Derbyshire*') which was applied by the learned judge in *Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No 1)* [2013] 7 MLJ 52; [2013] 1 CLJ 107 ('Kerajaan Negeri Terengganu').

[100] The learned judge had also rejected the contention of learned counsel for the appellants that both the appellants are not elected bodies and hence the *Derbyshire* case cannot apply to the case here. In respect of the first appellant, he had submitted that under art 5 of the Constitution the executive authority is vested in the Yang Di Pertua Negeri who acts on the advice of *Majlis Mesyuarat Kerajaan Negeri* and art 6(3) of the Constitution further provides that members of the said Majlis are the Chief Minister appointed by the Yang Di Pertua Negeri and not more than ten but not less than four other members of the Dewan

Undangan Negeri appointed by the Chief Minister. Relying on the case of *Basnol Abol & Ors v The State of Sarawak* [2004] 2 CLJ 553 at p 569, where it was held that the Government of Sarawak is a separate legal entity from the *Majlis Mesyuarat Kerajaan Negeri*, learned counsel for the appellants had submitted that the state government, as an institution is not an elected body. As for the second appellant, learned counsel for the appellants submitted that it is only a government department.

MY GROUNDS OF DECISION

Elected bodies

[101] On this matter, with respect to learned counsel for the appellant, I agree with the learned judge who had opined that the first appellant can only exist through the electoral process held every five years as provided in the Federal Constitution and as such the second appellant is only but a proxy of the first appellant. What the learned judge said is simply stating the plain and obvious. To say otherwise is simply denying also the plain and obvious. Accordingly, I find that both the first and second appellants are elected bodies and it is in that context that my grounds are premised on.

Derbyshire principle

[102] It cannot be denied that judging from the manner the submissions are fashioned by the respective learned counsel and the grounds of the learned judge, the rationale in *Derbyshire* is the focal point of this appeal. That being the case, I find it necessary to discuss what the Court of Appeal and Law Lords had expounded in their respective grounds.

[103] The facts there were these. The plaintiff there was the local council which is a democratically elected government body and had taken an action for defamation against the publishers of a Sunday newspaper, its editor and two journalists ('the defendants'). The defamatory articles related to the plaintiff's investment and control of its superannuation fund. The defendants took an application to strike out the action on the ground that the plaintiff, being a non-trading statutory corporation cannot maintain an action for libel which reflect its administrative reputation when no actual financial loss was pleaded.

[104] The application to strike out failed at the court of first instance but on appeal to the Court of Appeal, the aforesaid application to strike out succeeded and this is how the Court of Appeal (see *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; [1993] 1 All ER 1011) put it:

> Although in general a trading or non-trading corporation which could show that it had a corporate reputation (as distinct from that of its members) which was capable of being damaged by a defamatory statement could sue in libel to protect that reputation in the same way as could a natural person, a local authority had no right to sue for libel in respect of its governing or administrative reputation if no actual financial loss was pleaded or alleged. If a nontrading public authority were to have that right it would be able to stifle legitimate public criticism of its activities and thereby interfere with the right to freedom of expression enshrined in art 10a of the Convention for the Protection of Human Rights and Fundamental Freedoms, and a right to sue for libel was unnecessary in a democratic society for the protection of a public authority's reputation since that could adequately be protected by bringing an action for malicious falsehood or by a prosecution for criminal libel. It followed that the plaintiff local authority could not maintain an action for a libel which reflected upon it as a local authority in relation to its governmental and administrative functions, including its statutory responsibility for the investment and control of its superannuation fund. The appeal would therefore be allowed.

[105] The House of Lords on appeal affirmed the decision of the Court of Appeal and in doing so saw it fit not to rely on article 10a of the Convention for the Protection of Human Rights and Fundamental Freedoms but relied on common law to pronounce that an organ of local government cannot maintain an action for defamation. The rationale of the House of Lords can be discerned from the following paragraph of Lord Keith's opinion:

> There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.

The appellants' contention

[106] The submission of learned counsel for the appellants before us, in substance, is premised on s 3 of the Government Proceedings Act 1956 ('the GPA') which reads as follows:

> Subject to this Act and of any written law where the Government has claim against any person which would, if such claim had arisen between subject and subject, afford ground for civil proceedings, the claim may be enforced by proceedings taken by or on behalf of the Government for that purpose in accordance with this Act.

[107] According to the learned counsel for the appellants, s 3 of the GPA has conferred a legal right to a government to sue in defamation or libel as such claims can be made between private citizens. This right to sue, it is further submitted, is statutory in nature as it is a right conferred by an Act of Parliament and cannot be supplanted by the application of common law principles. Premised on that, he submitted that the learned judge had erred when she applied the *Derbyshire* principle to conclude that the appellants could not maintain an action for defamation.

[108] Learned counsel for the appellants further submitted that, in any event, the common law of England cannot be applied by virtue of s 3(1) of the Civil Law Act 1956 as there is already a written law in the form of s 3 of the GPA.

[109] With respect to the learned counsel for the appellants, I disagree with his contention and my reasons are as follows. His analysis of s 3 of the GPA is in fact, so to speak, asking half a question and getting half an answer. Why do I say that? In my view s 3 of the GPA is a general piece of legislation to cloth the government the legal status to sue or be sued, nothing more or nothing less. It only gives the government the statutory right to mount any legal action in any civil proceedings which are available to and among private citizens of the country. However, that does not answer the second half of the question and that is whether the government possess a 'cause of action' in an action for defamation. Only by asking the second half of the question and getting an answer will there be a complete question and answer. And with respect to the learned counsel for the appellants, that answer can only be found in the law of defamation independent of s 3 of the GPA which I now move to.

[110] The issue here is simply whether the *Derbyshire* principle is applicable in our law of defamation. Before I answer that, I wish to state the reliance of s 3 of the Civil Law Act by learned counsel for the appellants to support his contention is misplaced and my reasons are these.

[111] Section 3 of the Civil Law Act 1956 provides as follows:

> 3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia the Court shall —

A (a) ...

(b) ...

(c) in Sarawak, apply the common law of England and the rules of equity, together with the statutes of general application, as administered or in force in England on the 12th day of December, 1949, subject however to sub-section 3(ii) ...

B

[112] Premised on s 3 of the Civil Law Act, learned counsel for appellants submitted that since the *Derbyshire* principle came into existence only in 1993, C which is well beyond 1949 as provided in the Civil Law Act, our courts are prohibited from applying the English common law. My answer to that is simply the development of common law in Malaysia rests squarely in our hands and the courts are duty bound to develop the same to suit the times that we live in. It may well be that we adopt the English common law but once adopted it D becomes our common law. Hence s 3(1)(c) of the Civil Law Act is no impediment to our courts if and when they deem it fit to develop our common law. With that I move back to the pivotal issue mentioned earlier.

[113] In Malaysia, we have what we call a constitutional democracy where the E constitution reigns supreme as opposed to a Parliamentary democracy where Parliament reigns supreme. In our constitution, the citizens of the country are given certain basic rights, one of which is freedom of speech which is found in art 10 of the Constitution which reads as follows:

F 10 Freedom of speech, assembly and association

(1) Subject to clauses (2), (3) and (4):

(a) every citizen has the right to freedom of speech and expression;

(b) all citizens have the right to assemble peaceably and without arms;

G

(c) all citizens have the right to form associations.

(2) Parliament may by law impose:

(a) on the rights conferred by paragraph (a) of clause (1), such restrictions as it deems necessary or expedient in the interest of the H security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

I

(b) on the right conferred by paragraph (b) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;

(c) on the right conferred by paragraph (c) of clause (1), such restrictions as it deems necessary or expedient in the interest of the

security of the Federation or any part thereof, public order or morality.

[114] One can easily see from art 10 that freedom of speech is not absolute and rightly so in any modern democracy. It empowers the government of the day to limit that freedom for the common good of the country.

[115] To ensure that art 10 of the Federal Constitution is given its due importance, a common sense approach must be adopted and that is simply to start on a premise that constitutional rights of citizens must be jealously guarded in view of the fact that they are basic and fundamental in nature. These rights are also subject to a presumption in law that Parliament will not invade the same unless clear words are employed in Acts of Parliament. This approach reflects the views of the apex Court of Australia where Justices Gummow and Hayne in *Coleman v Power* (2004) 220 CLR 1 had stressed that, 'for the fundamental common law right of freedom of expression to be eroded, clear words are required' (see also *Bropho v Western Australia* (1990) 170 CLR 1 at pp 17–18).

[116] Examples of such clear words can be seen in this country in the Sedition Act 1948 and Printing Presses and Publications Act 1984. An illustration of such limitation is s 7(1) of the Printing Presses and Publications Act 1984 which says:

> 7(1) If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

[117] Such restrictions, of course, are not foreign in other jurisdictions. In Australia they have the Racial Discrimination Act 1975 (Cth) where in s 18C, it makes it unlawful for a person to do an act, other than in private if the act is reasonably likely, in all the person and the act is done because of the race or national origin of that person.

[118] Another legislation of significance is s 499 of the Penal Code which says as follows:

> Whoever, by words either spoken or intended to be read or by signs, or by visible representations, makes or publishes any imputation concerning any person,

intending to harm, or knowing or having reason to believe that such imputation will harm the reputation and shall also be liable to fine of such person, is said, except in the cases hereinafter excepted, to defame that person.

This provision is what we refer to as criminal defamation.

[119] We also have the Defamation Act 1957. However, nowhere in any Act of Parliament is there a specific provision allowing the government to maintain an action for defamation to stifle this constitutional right of freedom of speech of citizens of the country. The significance of the absence of such a provision cannot be underestimated. As I have said earlier, there is a presumption that the government will not invade constitutional rights and when they do, they can only do so by clear words employed in Acts of Parliament.

[120] I also associate myself with the sentiments of Lord Keith in *Derbyshire* when he said that 'not only is there no public interest favouring the right of organs of government, whether central or local, sue for libel, but that it is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech'. I also note that in jurisdictions of United States of America (*City of Chicago v Tribune Co* 139 NE 86 (1923)), Australia and Canada (*Halton Hills (Town) v Kirouac* [2006] OJ No 473 they have adopted the *Derbyshire* principle either in the form of statute or common law.

[121] Hence, I see no reason why we should not adopt the *Derbyshire* principle in our defamation law as it would be consistent not only to art 10 of the Federal Constitution but to all the hallmarks of a modern democracy. Those hallmarks, among others, relate to the need for accountability, the need for transparency, the need for freedom of expression and the need for a healthy and responsible fourth estate. As pointed out by the Law Lords in the *Derbyshire* case, the government continues to possess the right to take a criminal defamation action against whoever uttered defamatory words. As the government is a public body, it is only appropriate that criminal proceedings through the Attorney General Chambers are used to combat malicious defamatory utterances against the government of the day.

[122] For completeness, I now look at the cases cited by counsel and they are as follows:

(a) *Lembaga Kemajuan Tanah Persekutuan & Anor v Dr Tan Kee Kwong* [2012] 4 MLJ 622 ('Lembaga Kemajuan');

(b) *Tony Pua Kiam Wee v Syarikat Bekalan Air Selangor Sdn Bhd* [2013] 1 LNS 1433 ('Tony Pua');

(c) *Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad*

Nawawi & Ors (No 1) [2013] 7 MLJ 52; [2013] 1 CLJ 107 ('Kerajaan Negeri Terengganu');

(d) *Dato' Seri Diraja Hj Adnan Hj Yaakob v Utusan Melayu* [2015] MLJU 892; [2015] 7 CLJ 960.

[123] Learned counsel for the appellant referred to *Lembaga Kemajuan* where Linton Albert JCA (as he then was) stated as follows:

> The cross-appeal relates to the respondent's contention that the appellants as public authorities could not sue for defamation. There is no dispute relating to the first appellant being a government body, nor the second appellant as wholly owned by the first appellant thereby to all intents and purposes, a government body. The respondent relies on *Derbyshire County Council v Times Newspaper Ltd & Ors* [1992] QBD 770 a decision of the Court of Appeal which was affirmed by the House of Lords. The headnote in that case reads in part as follows:
>
> > The plaintiff, a local authority, brought an action for damages for libel against the defendants in respect of certain newspaper articles which made allegations in relation to share dealings involving the investment of moneys from the local authority's superannuation fund, sometimes by a complex series of deals, in companies connected with or controlled by a businessman.
> >
> > Held, allowing the appeal, that, notwithstanding the general principle that a trading or non-trading corporation was entitled to sue in libel to protect so much of its corporate reputation, as distinct from that of its members, as was capable of being damaged by a defamatory statement, a local authority, as a corporate public authority, was not entitled at common law to sue for libel to protect its governing reputation; that to allow it to do so would impose a substantial and unjustifiable restriction on freedom of expression.
>
> It is submitted on behalf of the respondent that the principle in *Derbyshire County Council* ought to be applied as it has also been applied in several commonwealth jurisdictions. With respect, we do not find any justification for applying the *Derbyshire County Council* principle here. In particular s 15(1) of the Act gives the 1st appellant the right to sue, and to be sued. It would be preposterous for the court to take away a statutory right by applying English common law principles. Even s 3(a) of the Civil Law Act which allows for the application of English common law does not contemplate its application beyond that which is administered on 7 day of April, 1956. Finally it is patently clear that the facts in the instant appeal can be distinguished from the facts in the *Derbyshire County Council* case in that here the 1st and 2nd appellants are a statutory body and a company registered under the Companies Act 1965 respectively whereas there the entity in question was a Local Authority. They are therefore totally different entities. There was therefore no merit in the cross-appeal.

[124] With respect, the aforesaid case is clearly distinguishable to the present case at hand. The appellants there are, as pointed out by Justice Linton himself, statutory bodies incorporated under the Companies Act 1965. In this present

case, the appellants are the state government and its proxy respectively, the existence of both was by virtue of an electoral process. Further the reliance on s 15(1) of the Land Development Act (which contains similar wordings as s 3 of GPA) is also flawed as pointed out earlier.

[125] As for *Tony Pua* case, learned counsel for the appellant relied on the following part of the judgment of Anantham Kasinather, JCA (as he then was):

> 16. The local authorities recognise the right of private companies involved in the provision of public services to sue in defamation. The reasons advanced by English authorities such as *Derbyshire County Council v Times Newspapers Ltd & Ors* [1993] AC 534 in denying this right to a company performing a similar role to the respondent in the United Kingdom to institute proceedings for defamation, has to date not been accepted by our courts as representing the law of this country. As we do not consider the impugned words to be defamatory, we do not propose in this judgment to interfere with the ruling of the learned trial judge that the respondent enjoyed the necessary locus to institute the claim for defamation against the appellant.

Again in this case, the respondent is a statutory body formed under the Companies Act 1965, hence distinguishable to this present case. In any event, there appears to be no detailed deliberation of whether the *Derbyshire* principle should be accepted as the law of the country as it was found there that the impugned words were not defamatory.

[126] It is not disputed that the local authority in *Derbyshire* came into existence, like the appellants here, by virtue of an electoral process, a point, in fact the pivotal point reading from the grounds of the learned judge, which was strongly contended by learned counsel for the appellants at the High Court. He had sought to distinguish *Derbyshire*, as pointed out earlier, on the ground that the appellants are not elected bodies and hence not applicable. There appears to be no contention by learned counsel, reading from the grounds of the learned judge, that the *Derbyshire* principle is not part of our law on defamation.

[127] The last case is *Kerajaan Negeri Terengganu* which, in our view, has the same factual matrix as this case. The plaintiffs in that case are the State Government of Terengganu and three others who had sued the defendants for defamation. Prior to the trial of the suit, the court had to deal with the preliminary issue of whether the first plaintiff, being the State Government of Terengganu, can maintain a defamation action in law.

[128] The learned judge after admirably analysing the relevant cases and statute thoroughly concluded that she ought to apply the *Derbyshire* principle and held that the State Government of Terengganu cannot in law maintain an action for defamation. She started her deliberation by determining the significance of s 3 of GPA and this was how she approached it:

> [14] Going by s 3 of the above Act, the government can institute a claim against any person if the claim that has arisen between subject and subject 'afford ground for civil proceedings'. Unfortunately, the phrase '*afford ground for civil proceedings*' has not been defined or given any meaning in the same Act.
>
> [15] The question that arises is *whether defamation, in particular libel, as in this case, affords ground to the 1st plaintiff*, being a State Government, to enforce the claim by proceedings taken by or on behalf of the State Government. Guidance on the answer to this question can be found by reference to case law. (Emphasis added.)

[129] Her Ladyship's approach is similar in substance to my approach and that is simply asking the second half of the question of whether the appellants have a 'cause of action' *(afford ground for civil proceeding)* in the law of defamation. The learned judge then gave her rationale for adopting the *Derbyshire* principle and held that the aforesaid principle is part of the law of defamation of the country. On appeal to this court, her decision was affirmed on 14 January 2013. Though no grounds were given by this court, it can be safely said that this court in *Kerajaan Negeri Terengganu* had accepted that the *Derbyshire* principle is part of our law on defamation as the grounds of Her Ladyship was solely anchored on the *Derbyshire* principle. From my research, it appears that there is no pronouncement on the *Derbyshire* principle by the apex court of the country. It is my view that the *Kerajaan Negeri Terengganu* is an apt authority for the application of the *Derbyshire* principle for the simple reason that it also concerned a state government as in this present case.

[130] While in the process of writing this judgment, it was brought to my notice that this court had recently dealt with the issue of whether the *Derbyshire* principle applies in our country. That occasion is the appeal against the decision of the High Court in *Dato' Seri Diraja Hj Adnan Hj Yaakob v Utusan Melayu* [2015] MLJU 892; [2015] 7 CLJ 960. The factual matrix as per the head notes is this. The plaintiff, the elected State Assemblyman for Pelangai and Chief Minister ('Menteri Besar') of the State of Pahang, claimed for defamation against the defendant in respect of a newspaper article in *Mingguan Malaysia*. The defendant sought to strike out the plaintiff's writ and statement of claim and re-amended statement of claim (encl 34) under O 18 r 19(1)(b), (c) and/ or (d) and O 92 r 4 of the Rules of Court 2012 ('the ROC'). The issue raised for the court's determination therein was whether the plaintiff had locus standi to institute and maintain the action against the defendant. The defendant submitted that the plaintiff, in his official capacity as the Menteri Besar of Pahang, lacked the locus to initiate and maintain the suit on the ground that the plaintiff was an elected representative who can be subjected to public criticism.

[131] The learned judge there dismissed the application to strike out on the ground that the plaintiff there was not suing in his official capacity as the Mentri Besar or Chief Minister. The learned judge had in fact applied the *Derbyshire* principle and as such she had to determine, as a matter of fact, whether the plaintiff was suing as the Chief Minister and if so, he would be barred from maintaining an action for defamation as the office of the Chief Minister is a democratic elected office. After perusing the pleadings, the learned judge found as a fact that the plaintiff was suing in his personal capacity and dismissed the application to strike out. On appeal to this court, the High Court's decision was overturned and the case was struck out on the ground that the plaintiff is suing in the capacity as the Chief Minister. Though no grounds are available yet, it can also be safely assumed that the *Derbyshire* principle was applied otherwise that suit would not have been struck out. Hence we can say that presently there are two appellate court decisions adopting the *Derbyshire* principle as part of the law of defamation in this country. I draw comfort for my view from those two decisions of this court.

[132] Across the causeway in Singapore, the courts there did not appear to have rejected the *Derbyshire* principle. In *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2006] SGHC 220, it was argued by the defendant there that whether the plaintiff being the Prime Minister had the locus to sue for defamation was an issue that should be tried. The defendant relied on the *Derbyshire* principle to contend that a government or public authority cannot be defamed, thus cannot sue for defamation. The learned judge rejected the defendant's argument premised on the rationale that the *Derbyshire* principle did not restrict an individual's right to sue for defamation even though that individual holds public office. Her Ladyship quoted with approval the legal principle expounded by VK Rajah J in *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 which states as follows:

> The case (Debyshire), however, makes it clear that the decision itself does not affect the right of an individual member or officer of a government body to sue if the statement about the body is capable of being interpreted as referring to the individual. Indeed, the ability of the individual to sue seems to be regarded as a reason for denying such right to the body: *Gatley on Libel and Slander* (Sweet & Maxwell, 10th Enclosure 2a dismissed, 2004) at para 8.20.

Needless to say the learned judge could have dismissed the point raised by the defendant there by rejecting rather than distinguishing the *Derbyshire* principle.

[133] Further, can one really say that governments have a reputation per se? Governments of the day are made up of the members of the winning political party and their reputation or popularity fluctuates due to numerous and varied reasons. It cannot be disputed that a government of the day may be so popular due to an implementation of a particular policy that no amount of defamatory

utterances could put a dent on its reputation or popularity. How does one measure or determine that reputation? Such is the nebulous nature of the reputation of a government. In any event, the government of the day can always rebut whatever that is said of it in the public domain. Lord Keith in *Derbyshire*, in my view, had put this in proper perspective when he said as follows:

> In the case of a local authority temporarily under the control of one political party or another it is difficult to say that the local authority as such has any reputation of its own. Reputation in the eyes of the public is more likely to attach itself to the controlling political party, and with a change in that party the reputation itself will change. A publication attacking the activities of the authority will necessarily be an attack on the body of councilors which represents the controlling party, or on the executives who carry on the day-to-day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceeding for defamation. Further, it is open to the controlling body to defend itself by public utterances and in debate in the council chamber.

Applying the above reasoning to the present case, as the alleged defamatory utterances are related to the management of the financial affairs of the state, the most proximate individual, I would imagine, could be the Minister of Finance of Sarawak in his own personal capacity. But that said and to avoid any doubt, let me say that I am not making any ruling that the aforesaid minister is the proper person who should be embarking on this suit of defamation against the respondent. That issue is left for another day.

CONCLUSION

[134] The right of an individual, be it any government officer or otherwise, to maintain an action for defamation is still preserved and must be regarded as a basic and fundamental constitutional right to defend one's reputation. My views, in no way, invade on that right.

[135] Finally, and for reasons stated above, I find that there is no reason for me to disturb the rationale of the learned judge on the point of locus of the appellants. However, I note that it was not necessary for the learned judge to deliberate and decide on the other three issues posed once she had decided that the appellants lacked locus to maintain an action for defamation. Accordingly, this appeal is dismissed with costs in the sum of RM10,000.

Appeal allowed, the High Court's decision to dismiss the appellants' claim set aside,

judgment entered against respondent and deputy registrar of the High Court ordered to assess damages payable by respondent.

Reported by Ashok Kumar